**KETUA PENGARAH HASIL DALAM NEGERI**

**v.**

**PAN CENTURY EDIBLE OILS SDN BHD**

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
MOHD NOOR AHMAD JCA
PS GILL J
[CIVIL APPEAL NO: W-01-200-1997]
31 JULY 2002

***REVENUE LAW:*** *Income tax - Interest income - Interest income derived from short term and long term deposits - Classification - Whether business income under s. 4(a) or interest income under s. 4(c) Income Tax Act 1967 - Whether fell within s. 4(a) if it constituted an income from a source consisting of a business receivable in the course of carrying on business - Whether excess cash was put to profitable use by placing it on short term and long term deposits*

The issue for determination in this case was whether the interest income of the respondent derived from short term and long term deposits was business income under s. 4(a) or interest income under s. 4(c) of the Income Tax Act 1967 ('the Act'). The effect of this classification was pertinent because by reason of s. 43 of the Act, adjusted losses from a business of a taxpayer for previous years of assessment could be set off from a source consisting of a business under s. 4(a) but not against income from any other source. Before the Special Commissioners of Income Tax, the appellant contended that the interest income fell under s. 4(c) as it was clearly 'interest' and not gains or profits from a business. On the other hand, the respondent contended that the interest income was part and parcel of its business income or ancillary to its business or it was business income arising out of an adventure or concern in the nature of a trade and therefore within s. 4(a). The Special Commissioners classified the interest income as business income under s. 4(a) and that was affirmed by the learned judge on appeal. The appellant now appealed to this court.

**Held:**
**Per Mohd Noor Ahmad JCA**

**[1]** This court was in complete agreement with what was summarised by the learned judge on the facts as found. Also, based on the Privy Council case of *American Leaf Blending Co Sdn Bhd v. Director-General of Inland Revenue*, despite the fact that interest was referred to in s. 4(c) of the

Act, it nevertheless constituted income from a source consisting of a business if it was receivable in the course of carrying on a business of putting the excess cash to profitable use by placing it on short term and long term deposits. (pp 789 a & 791 e)

*[Appeal dismissed.]*

*[**Bahasa Malaysia** Translation Of Headnotes]*

Isu untuk penentuan di dalam kes ini adalah sama ada pendapatan faedah responden yang diperolehi daripada deposit-deposit jangka pendek dan jangka panjang adalah pendapatan perniagaan di bawah s. 4(a) atau pendapatan faedah di bawah s. 4(c) Akta Cukai Pendapatan 1967 ('Akta tersebut'). Kesan klasifikasi ini adalah perlu kerana menurut s. 43 Akta tersebut, kerugian larasan daripada perniagaan seorang pembayar cukai untuk tahun-tahun taksiran yang lalu boleh ditolak daripada sumber yang terdiri daripada sebuah perniagaan di bawah s. 4(a) tetapi bukan terhadap pendapatan daripada mana-mana sumber lain. Di hadapan Pesuruhjaya-Pesuruhjaya Khas Cukai Pendapatan, perayu menegaskan bahawa faedah tersebut terlingkung di bawah s. 4(c) kerana ianya jelas merupakan 'interest' dan bukannya keuntungan atau perolehan keuntungan daripada sebuah perniagaan. Sebaliknya, responden menegaskan bahawa pendapatan faedah adalah sebahagian daripada perniagaannya atau bersampingan kepada perniagaannya atau ianya adalah pendapatan perniagaan yang berbangkit daripada usaha atau perniagaan yang bersifat perdagangan dan dengan itu adalah di bawah lingkungan s. 4(a). Pesuruhjaya-Pesuruhjaya Khas telah mengklasifikasikan pendapatan faedah sebagai pendapatan perniagaan di bawah s. 4(a) dan itu telah disahkan oleh hakim yang bijaksana apabila dirayui. Perayu kini merayu kepada mahkamah ini.

**Diputuskan:**
**Oleh Mohd Noor Ahmad HMR**

**[1]** Mahkamah ini bersetuju sepenuhnya dengan apa yang telah diringkaskan oleh hakim yang bijaksana atas fakta-fakta sepertimana yang didapati. Juga, berdasarkan kes Majlis Privi *American Leaf Blending Co Sdn Bhd v. Director-General of Inland Revenue*, meskipun pada hakikatnya faedah telah dirujuk di dalam s. 4(c) Akta tersebut, ianya namun begitu membentuk pendapatan daripada sumber yang terdiri daripada perniagaan jika ianya akan diterima dalam usaha menjalankan sesebuah perniagaan dengan meletakkan wang tunai lebihan bagi kegunaan mendatangkan keuntungan dengan meletakkannya sebagai deposit-deposit jangka panjang dan jangka pendek.

*[Rayuan ditolak.]*

**Case(s) referred to:**

*American Leaf Blending Co Sdn Bhd v. Director-General of Inland Revenue [1979] 1 MLJ 1* ***(refd)***

*Director General of Inland Revenue & Central Sugars Bhd [1978] 2 MLJ 71* ***(refd)***

*Edward v. Bairstow [1953-1956] 36 TC 207* ***(refd)***

*Edwards v. Bairstow [1956] AC 14* ***(refd)***

*Lower Perak Co-operative Housing Society v. Ketua Pengarah Hasil Dalam Negeri [1994] 3 CLJ 540* ***(refd)***

**Legislation referred to:**

Income Tax Act 1967, ss. 4(a), (c), 43(1)(a), (2)

*For the appellant - Hazlina Hussain (Ahmad Isyak Hassan); AG's Chambers*
*For the respondent - Dr Arjunan Subramaniam; M/s Geraldine Yeoh Arjunan & Assoc*

*[Appeal from High Court, Kuala Lumpur; Appeal No: R1-14-9-97]*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Mohd Noor Ahmad JCA:**

This is an appeal against the decision of the learned judge who dismissed the appellant's appeal. The appellant appealed to the learned judge by way of case stated against the deciding order of the Special Commissioners of Income Tax (the Commissioners) of 13 March 1997, which allowed the respondent's appeal to the Commissioners against the Notices of Assessment raised by the appellant under the Income Tax Act 1967 (the Act) for the years of assessment 1987 to 1990 in respect of interest income which the respondent received from its deposits of excess cash with the banks. The particulars of the notices of assessment are as in Schedule 1.

The learned judge had fully set out the facts of the case in his judgment. Hence, suffice to state briefly, the facts as found by the Commissioners. The respondent was involved in the business of refining and processing palm oil. The price of crude palm oil, the raw material for its business, fluctuated from time to time and hence, the amount of cash needed to purchase the crude palm oil varied from time to time. A certain amount of cash from the proceeds of sale of its products was needed to be readily held for the purchase of the crude palm oil. When the price of crude palm oil dropped, less cash was needed to fund the purchase and when its price went up, more cash was needed for the purpose. When less cash was needed to fund the purchase the excess cash was placed on short term and long term deposits and on negotiable certificates of deposits, that is to say, on very short term negotiable deposits. The short term deposits were all for very short terms on 30 days or one day call. The placing of deposits and lifting of deposits were continued on a regular and

repetitive basis (daily basis, week in and week out in each month) for the relevant years of assessment and were still continued up to the time when the Commissioners heard the appeal. The object of placing on short term deposits was to deal with excess cash in hand to turn over and make profits. The appellant raised the assessment as set out in Schedule 1 on the basis that the interest income was/is chargeable under s. 4(c) of the Act. In order to place all the deposits the respondent exercised managerial and organizational skills by monitoring the fluctuating prices of palm oil, by resorting to reuter reports, newspaper reports, and bankers' advice daily.

This case is centred on the provisions of s. 4 of the Act, which reads:

> Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:
>
> (a) gains or profits from a business, for whatever period of time carried on;
>
> (b) ...
>
> (c) dividends, interest or discounts;
>
> (d) ...
>
> (e) ...
>
> (f) ...

The issue for determination by the Commissioners was whether the interest income of the respondent derived from the short term and long term deposits is business income under s. 4(a) or is interest income under s. 4(c) of the Act? The effect of the classification is pertinent because by reason of s. 43 of the Act adjusted losses from a business of a taxpayer for previous years of assessment can be set off from a source consisting of a business under s. 4(a) but not against income from any other source.

Before the Commissioners the appellant contended that the interest income should be taxed as income under s. 4(c) of the Act on the basis that the interest income was clearly 'interest' and not gains or profits from a business. In support thereof, the appellant submitted, *inter alia*, that fixed deposit whether short term or long term was current asset and liquid cash which could be obtained at any time; there was no element of risk; though the transactions were repetitive they did not amount to trade; the respondent had placed idle cash in fixed deposits to earn interest income; the placing of money in fixed deposits had no relevance with the business of palm oil; it was not an adventure in the nature of trade as there was no profit making motive, nothing was bought for a quick sale at a profit and cash was not the stock in trade; the depositing of money in fixed deposit frequently was management of the

funds of the company and did not amount to frequency of business transactions; the badges of trade were not applicable and on the facts of the case nothing was done to deem it an adventure but was merely placing of money in fixed deposits.

On the other hand, the respondent asserted that the interest income from the said short term and long term deposits is part and parcel of its business income or ancillary to its business or it is business income arising out of an adventure or concern in the nature of a trade and therefore, should be chargeable to tax as income under s. 4(a) of the Act. The respondent rested its case on three approaches to establish its claim, that is to say, (i) interest income is business income (ii) the short term and long term deposits are ancillary to its main trade and (iii) the placing of the deposits is an adventure or concern in the nature of a trade. The Commissioners rejected approach (ii) because they were of the view that the two activities, that is to say, the processing and refining of palm oil and the placing of deposits are not in any way closely allied. However, they accepted approaches (i) and (iii) and after having considered that the motive for the deposits was intention to make profits for the company using idle funds or excess cash and they concluded that the interest income satisfied the criteria envisaged in order to qualify as business income or alternatively, as income from an adventure or concern in the nature of trade and that the transactions were carried out through a genuine structure and not an artificial structure set up especially to take advantage of the fiscal benefit. In short, they classified the interest income as business income under s. 4(a) of the Act. In the circumstances, they were satisfied that the respondent had succeeded in discharging the onus of proving that the assessments made by the appellant was excessive and erroneous. They allowed the respondent's appeal and ordered that the notices of assessment be amended as per Schedule 2.

The learned judge, guided by what was said by Lord Radcliffe in *Edward v. Bairstow* [1953-1956] 36 TC 207 HL at p. 226 and based on the facts as found in the case stated and the authorities cited, held that in the case stated there was nothing *ex facie* which was bad law and could tilt the balance in favour of the appellant, and thereby confirmed the Commissioners' decision.

An appeal from the decision of the Commissioners is only on a question of law by way of case stated. The court will interfere only if the case contains anything *ex facie* which is bad in law and which bears upon the determination, or if the facts found are such that no person judicially and properly instructed as to the relevant law could have come to the determination under appeal – see *Edwards v. Bairstow* [1956] AC 14, *Director General of Inland Revenue & Central Sugars Bhd.* [1978] 2 MLJ 71; *Lower Perak Co-operative Housing Society v. Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713 SC.

We have scrutinised the record in the review of the findings of primary fact made by the Commissioners. We are in complete agreement with what was summarised by the learned judge on the facts as found:

> It is a case of a company whose purpose is to make as much profit as possible for its shareholders. Having excess cash over its daily business it diverted the said excess for such period until it is needed for the purpose of business, by putting it in the bank to earn income. Otherwise, those excess fund would remain idle to the disadvantage of its shareholders. It is not a case where a predetermined amount was set aside by the company from time to time for purpose of it being invested in banks to earn interest. Those excess fund in this case together with the interest earned would be ploughed back into the company to be used in its business of refining and processing of oil palm in time of need. Those excess funds were in fact the temporary surplus working capital of the respondent as explained in paragraph 3 of Exhibit 'C.'

Having perused the authorities cited suffice for us to deal only with the Privy Council case of *American Leaf Blending Co. Sdn. Bhd. v. Director-General of Inland Revenue* [1979] 1 MLJ 1. In that case, the appellant company was incorporated with the object *inter alia* of carrying on a tobacco business. For the purpose of its business it purchased land and built a factory. Subsequently the company ceased to carry on the tobacco business as it was not profitable to do so. The land and buildings were let out to other companies. The company was assessed to income tax on the rental income and it sought to have the unabsorbed losses on the tobacco business and the unabsorbed capital allowances set off against the rental income. The Director-General of Inland Revenue disallowed the claim. On appeal it was allowed by the Special Commissioners who at the request of the Director-General stated a case for the opinion of the High Court. The High Court upheld the company's claim to be entitled to deduction of the unabsorbed adjusted losses but held that the unabsorbed capital allowances could not be taken into account in computing the income from the rents. On appeal, the Federal Court allowed the appeal of the Director-General, and held that the unabsorbed losses from the tobacco business could not be deducted from the rental incomes but agreed with the High Court that the unabsorbed capital allowances could not be taken into account even if the renting of the premises could be assumed to be a business. The company appealed. The question for determination before the Privy Council was – "Were the rents received by the company for the letting of its premises or parts thereof to other persons for use of storage income from a 'source consisting of a business' for the purposes of s. 43(1)(a) and (2) of the Act?" It was held that rents despite the fact that they were referred to in para. (d) of s. 4 of the Act nevertheless constitutes income from a source consisting of a business if they were receivable in the course of carrying on a business of putting the taxpayers property to profitable use by letting it out for rent. Lord Diplock said:

The first and general argument on the construction of the Act failed in both courts below. It can be dealt with shortly by their Lordships. It is based upon the charging section, section 4, which reads as follows:

> 4. Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:
>
> (a) gains or profits from a business, for whatever period of time carried on;
>
> (b) gains or profits from an employment;
>
> (c) dividends, interest or discounts;
>
> (d) rents, royalties or premiums;
>
> (e) pensions, annuities or other periodical payments not falling under any of the foregoing paragraphs;
>
> (f) gains or profits not falling under any of the foregoing paragraphs.

The contention is that paragraphs (a) to (e) refer to five separate classes of income that are mutually exclusive, in the same way as the various Schedules of the United Kingdom Income Tax Act, 1918 were held to be mutually exclusive by the House of Lords in *Fry v. Salisbury House Estate Ltd. Fry v. Salisbury House Estate Ltd.* [1930] AC 432. As was pointed out by the Judicial Committee in the Jamaican appeal *Commissioner of Income Tax v. Hanover Agencies Ltd. Commissioners of Income Tax v. Hanover Agencies Ltd.* [1967] 1 AC 681 the Salisbury House case turned on the peculiar structure and provisions of the United Kingdom Act, and threw no light upon the construction of other taxing statutes such as those of Jamaica or Malaysia whose structure and provisions are quite different.

If the words in the various paragraphs of section 4 of the Malaysian Act are given their ordinary meaning – and their Lordships see no reason why they should not be – there is plainly room for overlapping between one paragraph and another. A company may carry on business as an investment or holding company deriving its gains or profits from dividends and interest from the securities it owns. The gains or profit from the business of a bank or moneylender are largely derived from interest received on money lent. A property company or an individual may be carrying on the business of letting premises for rents from which the gains or profits of that business are derived.

That there is potential overlapping between paragraph (a) and paragraphs (c) and (d) is, in their Lordships' view, put beyond doubt by the provisions of section 24. The general rule laid down in sections 27 and 28 is that income other than income from a business does not become chargeable until it has actually been received. By section 27(1) this applied specifically to "rent". The purpose of section 24 is to provide as an exception to the general rule that on

computing chargeable income from a business book debts arising in the period of assessment shall be brought into account although not actually received. Sub-sections (4) and (5) apply this exception to dividends and interest on securities held by investment companies and interest receivable in the course of carrying on a business of lending money; while sub-section (1)(c) applies the same exception *inter alia* to debts arising "in respect of ... (c) the use or enjoyment of any property dealt with at any time in the course of carrying on a business."

So it is clear that "rents", despite the fact that they are referred to in paragraph (d) of section 4, may nevertheless constitute income from a source consisting of a business if they are receivable in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent.

Where premises are let in the course of carrying on the business of putting them to profitable use, section 43(1) in their Lordships' view given primacy to the classification of the rents receivable as income from a source consisting of a business, notwithstanding that they may also be classified under section 4(d) as "rents". What section 43(1) requires is that one should first determine whether the rents are income from a business. If they are, no further inquiry is necessary; adjusted losses from a business of the taxpayer for previous years of assessment are deductible in ascertaining the taxpayer's aggregate income. Thus on the question of construction of the Act their Lordships are in agreement with the High Court and the Federal Court.

In the same breath, we conclude that the interest despite the fact that it was referred to in para. (c) of s. 4 of the Act nevertheless constitutes income from a source consisting of a business if it was receivable in the course of carrying on a business of putting the respondent's excess cash to profitable use by placing it on short term and long term deposits.

Having reviewed the findings of primary facts made by the Commissioners and in the light of the relevant law we are satisfied that Commissioners are correct in their decision in holding that the interest income falls within s. 4(a) of the Act. Therefore, we dismiss the appeal with costs and confirm the deciding order of the Special Commissioners.

My learned brothers Abdul Hamid bin Haji Mohamad JCA and PS Gill JHC have read this judgment and have expressed their agreement with it.

**SCHEDULE 1**

| Year of Assessment | Date of Notice of Assessment | Tax Payable |
|---|---|---|
| 1987 | 30 October 1990 | RM839,515.20 |
| 1988 | 30 October 1990 | RM534,572.40 |
| 1989 | 30 October 1990 | RM137,732.35 |
| 1990 | 26 November 1990 | RM108,819.90 |

Interest income on 'short term' (30 days or less or at short call) deposits accrued to the respondent as follows:

| Period | Year of Assessment | Amount of Interest Earned |
|---|---|---|
| 1 October 1985-30 September 1986 | 1987 | RM294,364.85 |
| 1 October 1986-30 September 1987 | 1988 | RM577,252.24 |
| 1 October 1987-30 September 1988 | 1989 | RM47,653.42 |
| 1 October 1988-30 September 1989 | 1990 | NIL |

Interest income on 'long term' (111 days to 210 days) deposits accrued to the respondent as follows:

| Period Earned | Year of Assessment | Amount of Interest |
|---|---|---|
| 1 October 1985-30 September 1986 | 1987 | NIL |
| 1 October 1986-30 September 1987 | 1988 | NIL |
| 1 October 1987-30 September 1988 | 1989 | RM30,612.32 |
| 1 October 1988-30 September 1989 | 1990 | NIL |

Interest income on 'long term' (fixed period of four years) deposit accrued to the respondent as follows:

| Period Earned | Year of Assessment | Amount of Interest Earned |
|---|---|---|
| 1 October 1985-30 September 1986 | 1987 | NIL |
| 1 October 1986-30 September 1987 | 1988 | NIL |
| 1 October 1987-30 September 1988 | 1989 | RM101,308.50 |
| 1 October 1988-30 September 1989 | 1990 | RM37,996.71 |

**SCHEDULE 2**

| Tahun Taksiran | Tarikh Notis Taksiran | Jumlah |
|---|---|---|
| 1987 | 30 October 1990 | RM839,515.20 |
| 1988 | 30 October 1990 | RM534,572.40 |
| 1989 | 30 October 1990 | RM137,732.35 |
| 1990 | 26 November 1990 | RM108,819.90 |